Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA,
Appellant,

vs.

PARAMOUNT PICTURES, *et al.*,
Appellees.

No. 79

MEMORANDUM OF THE TWENTIETH CENTURY-FOX, LOEW'S, RKO, PARAMOUNT AND WARNER APPELLEES IN OPPOSITION TO THE MOTIONS OF THE SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS AND THE CONFERENCE OF INDEPENDENT EXHIBITORS' ASSOCIATIONS FOR LEAVE TO FILE BRIEFS *AMICI CURIAE*

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The Twentieth Century-Fox, Loew's, RKO, Paramount and Warner appellees have declined to consent to, and now oppose, for the following reasons, the filing of briefs *amici curiae* on behalf of the Society of Independent Motion Picture Producers and the Conference of Independent Exhibitors' Associations:

1. The briefs merely present the self-interested points of view of the applicants and urge action with respect to the decree which are different from and, in some respects, in conflict with the relief sought in this Court by the parties to the cause.

2. No claims are made that the public interest is not adequately represented by the Solicitor General, nor could such claims be properly made.

3. These appeals will require this Court to consider main and reply briefs by the Government and by eight separate groups of defendants, as well as briefs submitted on behalf of certain proposed intervenors. It seems probable that other groups will seek leave to file briefs as *amici curiae*. The present briefs go so far outside the record, and so inadequately treat of the decision below, that if they were to

be accepted by this Court it would be necessary for the defendants to reply to each of them.

We do not believe that it will serve the convenience of the Court to have its record burdened with such a multiplicity of briefs by groups not directly concerned in the action.

Dated
New York, N. Y.
December 12, 1947

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STATEMENT AS TO JURISDICTION

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1349 80

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

No. 1350 81

PARAMOUNT PICTURES, INC., and PARAMOUNT FILM DISTRIBUTING CORPORATION,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

STATEMENTS AS TO JURISDICTION
(With Opinions, Decree and Order)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*, *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 1349
PARAMOUNT PICTURES, INC., and PARAMOUNT FILM DISTRIBUTING CORPORATION, *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 1350

STATEMENTS AS TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL TO REVIEW THE JUDGMENT HEREIN.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the above appellants severally submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction upon appeal to review the Judgment, Decree and Final Order of the United States District Court for the Southern District of New York entered in the office of the Clerk of said Court on December 31, 1946, and the Order of said Court entered February 11, 1947.

Petitions for Appeal were filed in the District Court on February 26, 1947, and were allowed by order of the same date.

The plaintiff, pursuant to an order dated February 21, 1947, appealed from the Decree entered December 31, 1946 and filed its Assignment of Errors therewith. Twenty-five specific assignments of errors are set forth in the plaintiff's appeal.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the Judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 15 U. S. C. Sec. 29), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. Sec. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

U. S. v. *Crescent Amusement Co.*, 323 U. S. 173 (1944);

U. S. v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944);

Interstate Circuit v. *U. S.*, 306 U. S. 208 (1939);

Sugar Institute v. *United States*, 297 U. S. 553 (1936);

United States v. *American Tobacco Co.*, 221 U. S. 106 (1911);

United States v. *Reading Co.*, 226 U. S. 324 (1912).

Statutes Involved

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. Sections 1 and 2), reading in part as follows:

"§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . .

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

The Copyright Act of March 4, 1909, 35 Stat. 1075-1088 (17 U. S. C.), and particularly those portions reading as follows:

"Section 1. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcrip-

tion or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;

* * *

§ 4. The works for which copyright may be secured under this title shall include all the writings of an author.

§ 5. The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

* * *

(l) Motion-picture photoplays;

(m) Motion pictures other than photoplays."

The Issues and the Rulings Below

The original petition in this action was filed on July 20, 1938. It charged concerted monopolization of the domestic motion picture industry by eight of the principal units therein, five of which (Fox, Loew's, Paramount, RKO and Warner) were engaged in producing, distributing and exhibiting motion pictures, two of which (Columbia and Universal) were producers and distributors, and one of which (United Artists) was engaged only in distributing motion pictures.

The petition prayed for injunctive relief against certain trade practices existent in the distribution branch of the motion picture industry, and also demanded that the five first named companies, which were designated in the peti-

tion as the producer-exhibitor defendants, be required to divest themselves of all their theatres and theatre interests and be enjoined from thereafter acquiring new ones.

The defendants answered the petition and denied its material allegations.

The case first came on for trial on June 1, 1940, before the United States District Court for the Southern District of New York. Before any testimony was taken, negotiations were begun for the disposition of the case by consent decree.

An amended and supplemental complaint was filed on November 14, 1940. This amended and supplemental complaint prayed: (1) that each of the alleged contracts, combinations and conspiracies in restraint of trade, together with the alleged attempts to monopolize the same, be declared illegal; (2) that the defendants be perpetually enjoined from continuing to carry out the alleged attempts at monopolization and all the alleged restraints of trade in the production, distribution and exhibition of motion pictures; (3) that a nation-wide system of impartial arbitration tribunals, or such other means of enforcement as the Court might deem proper, be established in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices might be decreed; and (4) that the five major defendants and their subsidiaries be directed to divest themselves of all interest and ownership, both direct and indirect, in any theatres which the Court might find had been used by one or more of them unreasonably to restrain trade and commerce in motion pictures.

The defendants filed answers denying the material allegations of the amended and supplemental complaint, and thereafter the plaintiff and the five producer-exhibitor de-

fendants and their subsidiary corporations executed a written consent to the entry of a decree by the District Court.

On November 20, 1940, a decree was made and entered in accordance with such consent, upon plaintiff's motion and before any testimony had been taken, which decree among other things, enjoined the five producer-exhibitor defendants from engaging in certain trade practices, such as "block booking", "blind selling" and "forcing." In addition, the decree enjoined the five producer-exhibitor defendants from engaging in a general program of expanding their respective theatre holdings for a period of three years. The decree provided, however, that nothing contained therein should prevent any defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business.

The Consent Decree also provided, as prayed in the amended and supplemental complaint, for the determination by arbitration of certain disputes between exhibitors and distributors.

As a result, Arbitration Tribunals were set up in the various exchange districts in the United States for the hearing of these arbitrable complaints, and an Appeal Board was constituted and the members thereof appointed by the District Court. These Arbitration Tribunals were established and procedure was prescribed by rules and regulations set forth in an appendix to the Consent Decree. The American Arbitration Association acted as the administrator of the arbitration system.

The Decree further provided that for a period of three years after its entry the plaintiff would not seek to divorce the production or distribution of motion pictures from their

exhibition, or to dissolve any defendant or break up any circuit of theatres of any defendant, or to require any defendant to divest itself of its interests in theatres.

The Court expressly retained jurisdiction for the purpose of enabling any party to the decree to apply to it at any time more than three years after the date of the entry of the Decree for any modification thereof.

After the expiration of the three year period referred to in the Consent Decree, the plaintiff moved to amend the decree of November 20, 1940, and on June 13, 1945, filed an application, pursuant to the Expediting Act, 15 U. S. C. § 28, with the senior Circuit Judge for the appointment of a special three-judge Expediting Court to hear and determine the issues. This court was duly constituted on June 16, 1945, with Augustus N. Hand, Circuit Judge, Henry W. Goddard, and John Bright, District Judges, and hearings commenced on October 8, 1945.

The Court rendered its Opinion on June 11, 1946, and its Judgment, Decree and Findings of Fact and Conclusions of Law and Supplemental Opinion on December 31, 1946. Thereafter certain of the defendants moved to amend the Decree in certain respects, and to amend one of the Conclusions of Law. This motion was denied by order entered February 11, 1947, except that Paragraphs (2) and (4) of Section III were modified so as to provide that the arrangements therein referred to should be terminated prior to July 1, 1947, rather than within 60 days after the entry of the Decree. Copies of the Opinion, the Supplemental Opinion and the Decree, as well as the Order entered February 11, 1947 are submitted herewith.

In brief, the Court decided that the eight defendants had violated the Sherman Act by engaging in certain

trade practices, which the Court enjoined. The Court found that the illegalities and restraints were not in the ownership of theatres, but in certain trade practices and arrangements dealt with in the Decree.

As it was conceded by the plaintiff at the trial that there was active competition in the production of motion pictures, the charges in respect thereto were formally abandoned by the plaintiff and dismissed by the Court in its Decree.

The Questions Involved Are Substantial

The following questions are substantial and are fully covered by these appellants' several Assignments of Errors. These questions were properly raised before the District Court, both during the trial and on arguments before the Court relating to the formulation of Findings of Fact and Conclusions of Law and the Decree.

1.

The amended and supplemental complaint prayed, among other things, that a

> "nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein."

An arbitration system was established by judgment of the United States District Court for the Southern District of New York entered November 20, 1940, pursuant to this

prayer of the amended and supplemental complaint and the consent of the plaintiff and these appellants. The Court found that this arbitration system operated as follows:

> "160. The arbitration system created by the Consent Decree of November 20, 1940, has demonstrated its usefulness in dealing with exhibitors' complaints of unreasonable clearance and if extended to cover differences which may occur under the system to be established by the Decree herein, will be effective and result in quick and expeditious decisions and a saving of time and money."

In view of the fact that this arbitration system for settling trade disputes was established pursuant to the prayer of the amended and supplemental complaint, pursuant to the consent of the plaintiff and the appellants, and pursuant to the formal judgment of the Court, and since the trial of this action proceeded only after a motion to modify that judgment of November 20, 1940, it is the appellants' position that the Court had ample power to continue its judgment establishing the arbitration system. It is clear that the Court would have continued the arbitration system, if it had thought it had the power so to do. It stated in its Supplemental Opinion:

> "The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.

> Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the prayer of the amended and supplemental complaint by the United States filed November 14, 1940, in which, among other things, the plaintiff prayed that 'a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein.'
>
> We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree."

The Court's holding that it lacked power to continue the arbitration system is contrary to the decision in *United States* v. *Swift & Co.*, 286 U. S. 106, 114-115, 117 (1931), and involves a substantial question for review.

2.

The Decree entered by the Court below prohibits the owner of a feature motion picture from agreeing with a licensee that the latter shall charge a specified minimum admission price during the exhibition of that licensed feature. Many features are licensed under terms which reserve to the licensor as film rental a percentage of the admissions received by the licensee during the period of exhibition. During such period, therefore, the licensor has an immediate and direct interest in the admission prices charged. The Decree deprives him of the right, which he

has under the Copyright Laws and the common law, to protect his interest by contract.

The owner of a motion picture, copyrighted or not, may exhibit it to the public and charge an admission fee. The owner, without parting with his title to that picture, may authorize another to exhibit it to the public; when that other person so exhibits the picture he necessarily charges an admission price. It is submitted that there is nothing in the anti-trust laws which prohibits the owner and the person authorized (or permitted or licensed) to show the picture to the public at an admission price to agree as to what that admission price shall be.

The prohibition, imposed by the Court, has particular effect in the case of a feature of unusual cost, where it is necessary to "roadshow" the production at a specified admission price during the roadshow engagement, in order to recover the exceptional investment. The record shows that during a period of several years prior to the trial only four features, of all the releases of the eight defendants, were road shown. Each of these was an outstanding and unusual feature, costly in production, and of such importance as to warrant, if required, its exhibition as the sole item of a program, without accompanying shorts or other entertainment. The limited number of such features suitable for roadshow exhibition precludes the possibility that their continued production and exhibition as roadshows can be the basis of an unlawful monopoly. By their very nature, such unique features can not become the subject of any concerted action in unreasonable restraint of trade. The Decree as drawn will prevent the production in the future of such occasional and unusually costly features, since their production costs can only be recovered by

roadshow exhibitions. Thus the Decree not only deprives each defendant of rights which he is entitled to enjoy under the Copyright Laws and the common law, but in addition, the public will be deprived of the entertainment value of the exceptional feature motion picture.

3.

The Decree enjoins the five exhibitor-defendants from continuing to own any beneficial interest in any theatre with an independent exhibitor, unless the interest shall be 5% or less, or 95% or more (Section III, Paragraph (5) of the Decree). The Decree compels these exhibitor-defendants to dispose of many valuable theatre interests falling within the banned percentages, unless they can arrange to purchase the partial interests of their respective co-owners, and then only, if they can obtain Court approval of such purchase. The decision of the District Court prohibiting the continuation of arrangements between a defendant and an independent exhibitor for the joint ownership or operation of a theatre did not result from the trial of any issue tendered by the plaintiff or contested during the hearings. Therefore there is no justification for the portions of the Decree which condemn such theatre interests held with independent exhibitors. In this respect, the Decree is contrary to the decision in *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386 (1945).

4.

The Decree [Section III, Paragraph (6)] enjoins each of the theatre-owning defendants from expanding its present theatre holdings, except for the limited purpose of

acquiring, if approved by the court, a co-owner's interest in theatres, in order to carry out the injunction against the continuance of the joint interests previously mentioned. In its opinion, the Court stated:

> "But it [the divestiture provision applying to joint interests] shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the later case, this court or other competent authority shall approve the acquisition after due application is made therefor."

Notwithstanding its position thus expressed, the Court denied the motion of certain of the defendants to amend this provision of its Decree so as to permit a defendant-exhibitor to expand its theatre holdings "for the purpose of acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field, if such defendant shall show to the satisfaction of the Court, and the Court shall first find that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures." The failure and refusal of the Court so to provide in its Decree, involves a substantial question for review. The Decree entered by the Court below in this case stands as a barrier to healthy growth on a competitive basis and does not permit future acquisitions even "after an affirmative showing that such acquisition will not unreasonably restrain competition." It is, therefore far more restrictive than the decree directed by the Supreme Court in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 187 (1944).

The foregoing are among the substantial questions raised by these several appeals. Other substantial questions are likewise raised in the Assignments of Errors herewith submitted and the defendants and each of them reserve the right to urge them upon their respective appeals.

Each of the appellants is of the belief that all questions here raised, as well as others raised by the respective Assignments of Errors, but not specifically referred to herein, are substantial and each respectfully petitions the Supreme Court to pass on them after plenary hearing.

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Dated, February 26, 1947.